# Supreme Court

OF THE

# United States

**Caroline W. Dobbins,**
*Plaintiff in Error,*

*vs.*

**The City of Los Angeles,**

## BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

This is a case in error to the Supreme Court of the State of California, to review a judgment of that court affirming the judgment of the Superior Court of the State of California, in and for the county of Los Angeles, dismissing the complaint of the plaintiff, Caroline W. Dobbins, in a suit brought by her against the city of Los Angeles, for an injunction to restrain the city and its officials from enforcing certain ordinances prohibiting the erection or maintenance

of gas works or receptacles for the storage of gas, outside the limits of a certain prescribed district in said city.

The complaint alleged substantially as follows:

**Statement of the Case.**

That on August 26th, 1901, the council of the city of Los Angeles adopted ordinance No. 6663 (new series), making it unlawful "for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory, for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles," outside of the limits of a certain district, described in the ordinance, and prescribing the penalty for a violation of such ordinance. (tr. p. 1-3, fols. 5-9).

That about September 1st, 1901, the plaintiff, Caroline W. Dobbins, made a contract with the Valley Gas and Fuel Company, a corporation, whereby that company undertook to erect for the plaintiff certain gas works and coke ovens for the manufacture, recovery and storage of gas, on premises in said city thereafter to be designated by the plaintiff. (tr. p. 1, fol. 6.)

That thereafter, to-wit: about September 28th, 1901, the plaintiff, for the purpose of erecting such gas works and coke ovens, purchased cer-

tain premises within the limits of the district described in ordinance No. 6663 (new series). (tr. p. 3, fol. 9.)

That about November 1st, 1901, the plaintiff made application to the board of fire commissioners of the city of Los Angeles, for a permit to erect gas works upon the premises purchased by her, under the provisions of ordinance No. 6108 (new series), of the city of Los Angeles, making it unlawful "for any person..... to erect or cause to be erected..... any ..... gas works ..... within the corporate limits of said city, without a permit from the fire commissioners so to do." (tr. p. 4-5, fols. 10-12.)

That on November 22nd, 1901, the board of fire commissioners of the city of Los Angeles granted the application of the plaintiff; and thereupon, on the same day, the plaintiff directed the Valley Gas and Fuel Company to proceed at once with the erection of the gas works and coke ovens upon the premises so purchased by her; and, pursuant to such direction, that company entered into contracts for the erection of different portions of said gas works and coke ovens; that the foundations were constructed at a cost of upwards of $2,500, and that, if the same should have to be destroyed or removed, it would cause irreparable injury to the plaintiff and the Valley Gas and Fuel Company; that about November

25th, 1901, after all material for the construction of said foundations had been placed upon the ground and the foundations had been nearly completed, the city council passed ordinance No. 6779 (new series), amending ordinance No. 6663 (new series), above mentioned, so as to extend the boundaries of the territory within which the erection or maintenance of gas works, gas tanks or reservoirs, was prohibited. That the premises of the plaintiff were included in such extended boundaries. (tr. p. 6-10, fols. 14-22.)

Plaintiff also alleged that said ordinance No. 6779 (new series), is void and invalid in that it is uncertain, unreasonable, and is an attempt to regulate in an unlawful manner the business of erecting gas works, and is in violation of the rights of plaintiff under the contract between her and the contractors for the erection of said gas works, and in violation of the rights granted to her by the city under the aforesaid permit, and is in violation of the constitutional prohibitions against the passing of any law impairing the obligations of contracts. (tr. p. 9, fol. 19.)

That the work of constructing the gas works and coke ovens for plaintiff was prosecuted, without interruption, until the latter part of February, 1902, when, as plaintiff alleges, the city of Los Angeles, combining and confederating with one James R. C. Burton and other persons unknown to the plaintiff, caused certain employes

of the Valley Gas and Fuel Company, engaged upon said work, to be arrested on a complaint filed in the city police court, charging them with a violation of ordinance No. 6779 (new series); that on March 1st and March 3rd, 1902, respectively, other employes of that company were arrested, at the instance of the city, on like charges. (tr. p. 11-12, fols. 24-25.)

That on March 3rd, 1902, the city council adopted ordinance No. 7029 (new series), again amending ordinance No. 6663 (new series) in respect to the description of the district from which gas works and gas receptacles should be excluded (tr. p. 12 fol. 26), and that on March 6th, 1902, the city caused several persons, employed by the Valley Gas and Fuel Company on the work of constructing the gas works for the plaintiff, to be arrested upon the charge of violating the amended ordinance (tr. p. 14, fol. 30).

Plaintiff also alleged that said ordinance No. 7029 (new series) is void and invalid in that it is uncertain, unreasonable, and is an attempt to regulate in an unlawful manner the business of erecting gas works, and is in violation of the rights of plaintiff under the contract between her and the contractors for the erection of said gas works, and in violation of the rights granted to her by the city under the aforesaid permit, and is in violation of the constitutional prohibitions

against the passing of any law impairing the obligations of contracts. (tr. p. 14, fol. 29.)

That the city of Los Angeles threatens to, and, unless restrained by an order of court, will, institute other similar proceedings against and arrest the employes of the plaintiff and of her contractors, and continue such prosecutions until the plaintiff desists from the erection of said gas works. (tr. p. 15-16, fols. 31-32.)

That the adoption by the city council of the city of Los Angeles of the ordinances under which the arrests, mentioned in the complaint, were made, and the attempted enforcement thereof by the prosecuting officers of the city, were instigated by officers and agents of the Los Angeles Lighting Company, a corporation engaged in manufacturing and supplying gas in the city of Los Angeles, and having a monopoly of such business therein; and that the acts of the municipal authorities were done solely for the purpose of protecting the Los Angeles Lighting Company in the enjoyment of its monopoly of the gas business in the city of Los Angeles (tr. pp. 19-21, fols. 40-43).

That the territory surrounding the premises of the plaintiff is and was a district devoted to manufacturing and commercial enterprises almost exclusively, and that it embraces a large amount of vacant and unoccupied land, which is and will

continue to be, comparatively worthless, except as sites for manufacturing establishments. (tr. pp. 21-22, fols. 44-45.)

That the gas works, which are being constructed for the plaintiff, are to be built upon concrete foundations, with a superstructure of incombustible materials, and that there can be no danger from explosions, bursting or leakage; that the machinery is to be of the most approved pattern, and that the works can, and will be, operated and maintained so that there will be no leakage or escape of odors or any interference with the health, comfort or safety of the inhabitants of the city of Los Angeles. (tr. p. 22, fols. 45-46.)

That if the city of Los Angeles, its officers and employes, shall be allowed to arrest, and continue to arrest, the employes of the plaintiff, and her contractors, engaged in the erection of said gas works or in the operation and maintenance thereof when completed, the plaintiff will be deprived of the rights and property she has already acquired, and will suffer great and irreparable loss; that already, in consequence of the acts of the defendant in hindering and delaying the plaintiff, as alleged in the complaint, she has suffered damages in the sum of upwards of $25,000; that in the erection of said works the plaintiff has already expended upwards of the sum of $50,000, over and above the cost of the premises upon which the same are located, and if she is

compelled by the defendant to desist from completing said works, this expenditure will be entirely lost to her, and that she will be subjected to great expense, inconvenience and embarrassment, without any redress or adequate remedy at law. (tr. pp. 23-24, fols. 46-48.)

The plaintiff prays in her complaint, that the permit granted to her by the board of fire commissioners of the city of Los Angeles on November 22nd, 1901, upon her application for leave to erect said gas works, be declared to be a valid and existing contract between the city of Los Angeles and the plaintiff, and that all ordinances passed by the city council of said city in contravention thereof, be declared null and void, as against the plaintiff; that the defendant, its officers, attorneys or agents, and all persons combining or confederating with it, and each and every of them, be enjoined and restrained from enforcing said ordinances against the plaintiff, and from in any manner delaying, interfering with, or obstructing the plaintiff in erecting said works, and from interfering with the operation or maintenance of the same; and that the plaintiff may have general relief (tr. pp. 24-25, fols. 48-50).

To this complaint a demurrer was interposed on behalf of the city, upon the grounds:

(1.) That the complaint did not state facts sufficient to constitute a cause of action;

(2.) That the court had no jurisdiction of the defendant or of the subject of the action (tr. p. 26, fols. 51-52).

The court sustained the demurrer to the complaint; and it was ordered and decreed that the plaintiff take nothing by her action. (tr. p. 27, fols. 52-53).

The plaintiff appealed from this judgment to the Supreme Court of the state, which affirmed the judgment (tr. pp. 30-33, fols. 59-65). (Caroline W. Dobbins v. The City of Los Angeles, 139 Cal. 179.)

The assignment of errors presented by the plaintiff in error upon this appeal are substantially as follows:

That the Supreme Court of the state of California erred in deciding:

1. That the ordinance complained of was valid as to the rights of plaintiff in error acquired before its passage;

2. That said ordinance was a valid police regulation;

3. That said ordinance did not impair the obligation of contracts made before the passage of the ordinance;

4. That said ordinance did not deprive plaintiff of property without due process of law; and

5. That the court erred in not deciding that the plaintiff in error was entitled to an injunction

restraining the city from enforcing said ordinance by criminal prosecution. (tr. pp. 45 to 47, fols. 86 to 89.)

While the plaintiff in error, in her complaint, attacks the validity of ordinances Nos. 6779 and 7029 (new series), and asks to have the city restrained from enforcing either of them, on the ground that they are unconstitutional and void, yet the Supreme court of the state in its opinion discusses only the validity of ordinance No. 7029, and plaintiff in her assignment of errors specifies the decision of the state court as to the last named ordinance only as being erroneous, and, accordingly, we shall, in our argument, treat this ordinance as the one in controversy, especially, as it appears from the record that it has taken the place of the former ordinance No. 6779 on the same subject.

## BRIEF OF THE ARGUMENT.

I.

The enactment of the ordinance drawn in question was fully within the police powers of the city of Los Angeles.

Constitution of California, Sec. 11, Art XI.

Statutes of California, 1869-70, p. 815.

Charter of Los Angeles, Secs. 2, 25, 27 and 40.

Statutes of California, 1889, p. 458.

Munn v. Illinois, 94 U. S. 113.

Westfield G. and M. Co. v. Mendenhall, 142 Ind. 538.

New Orleans Gas Co. v. Louisiana L. Co., 115 U. S. 650.

Tiedeman on Police Powers, Vol. II, p. 740.

Jamieson v. Indiana Natural G. & Oil Co., 28 N. E. 76.

Lanigan v. N. Y. Gas & L. Co., 71 N. Y. 29.

*Ex-parte* Lacy, 108 Cal. 326.

Crowley v. Christensen, 137 U. S. 86.

II.

The allegations of the complaint as to the unreasonableness of this ordinance are not sufficient to sustain a decision against its validity.

Slack v. Jacob, 8 W. Va. 612.

Harmon v. City of Lewiston, 46 Am. St. Rep. 893.

Darnelly v. Cabanns, 52 Ga. 212.
Wells v. Mayor, 43 Ga. 67.
State v. Schlenker, 51 L. R. A. 351.
People v. Cipperly (N. Y.), 4 N. E. 108.
*In re* Wilshire, 103 Fed. 620.
Barbier v. Connolly, 113 U. S. 27.

III.

All rights in contracts and property are held subject to such regulations as may be made from time to time by the State for the protection of public health, comfort and safety.

Cooley Cons. Lim., 6th Ed. 707.
Mugler v. Kansas, 123 U, S. 669.
Corporation of Knoxville v. Bird, 12 B. J. Lea, 121.
City of Salem v. Maynes, 123 Mass. 372.
Barbier v. Connolly, 113 U. S. 27.
City of New Orleans v. Stafford, 21 Am. Rep. 563.
2 Story Cons. Lim., Sec. 1954.
Jamieson v. Ind. Natural G. & Oil Co., 28 N. E. 76.

IV.

A municipality cannot in any manner barter away, part with or abridge its right to exercise the police powers delegated to it by the State.

Cooley Cons. Lim., 6th Ed., p. 341.
Russell on Police Powers, p. 88.
Davenport v. City of Richmond, 81 Va. 636.

Newson v. City of Galveston, 13 S. W. 368.
Northwestern Fertilizer Co. v. Hyde Park, 97 U. S. 659.

V.

The question, whether the State court erred in refusing to consider or decide the claim of plaintiff in error that she was entitled to an injunction against the enforcement of the ordinance complained of by criminal prosecution, does not arise on this appeal.

VI.

A bill in equity will not lie to restrain the enforcement of a municipal ordinance by criminal prosecution upon the mere ground of its alleged invalidity.

*In re* Sawyer, 124 U. S. 200.
Fitts v. McGhee, 172 U. S. 528.
Davis and Farnum Mfg. Co. v. Los Angeles, 115 Fed. 537.
Davis and Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.
Hemsley v. Myers, 45 Fed. 283.
Wagner v. Drake, 31 Fed 849.
Minneapolis Brewing Co. v. McGillivray, 104 Fed. 272.

VII.

The motives of a legislative body in enacting a law cannot be inquired into by the courts.

Fletcher v. Peck, 6 Cranch 87.

Dodge v. Wolsey, 18 How. 371.

U. S. v. Des Moines R. R. Co., 142 U. S. 545.

Hing v. Crowley, 113 U. S. 703.

## ARGUMENT.

### I.

**The enactment of the ordinance drawn in question was fully within the police powers of the City of Los Angeles.**

The ordinance complained of (being ordinance No. 7029, new series) was one prohibiting the establishment or maintenance of gas works, or receptacles for the storage of gas, in the city of Los Angeles outside of a certain prescribed district. The enactment of this ordinance was fully within the police powers delegated to the city by the state.

Section 11 of Article XI. of the constitution of California provides that:

"Any county, city, town or township, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

An act of the legislature of California, approved April 4th, 1870, relating to gas companies, gives authority to all municipal corporations in the state to grant to any gas company the privilege of laying down pipes in their streets and alleys, and, in section 4 thereof, provides that—

"They may also control the location and construction of works so that they may be erected in suitable localities to give the least discomforture or annoyance to the public." (Statutes of California, 1869-70, page 815.)

This act was expressly continued in force by subdivision 20, section 19, of the Political Code of the state of California.

The charter of the city of Los Angeles contains the following provisions:

Section 2. "The said corporation shall have the power * * * (Sub. 22) to make and enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws, and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants."

Section 25. "It may, by ordinance, declare what constitutes a nuisance, and provide for the abatement and removal thereof."

Section 27. "It (the council) shall by ordinance, regulate, and may prohibit, the keeping of gun powder, acids, or other explosive, combustible or inflammable material within the limits of the city, or any specified part thereof."

Section 40. "The council shall also have full power to pass ordinances upon any other subject of municipal control or to carry into effect any other powers of the municipality."

Charter of Los Angeles;

Stats. of Cal. 1889, p. 458.

From these provisions it will be seen that the city of Los Angeles has general police powers, and that such powers are, by the statutes of the state and the city charter expressly extended to the regulation and conduct of the business of manufacturing and distributing gas, and of the

keeping of combustible or inflammable material within the city.

It is within the police power to regulate all occupations and business enterprises which are of a *quasi*-public nature, or which may, if not restricted in their exercise, be injurious to the public health, safety, morals, or to the general welfare.

Accordingly it has been held that the police power extends to regulation of the location and conducting of markets, laundries, bakeries, pawnshops, dairies, warehouses, wharves, ferries, and railways.

"This brings us to inquire as to the principles "upon which this power of regulation rests in "order that we may determine what is within and "what is without its operative effect. Looking "then to the common law, from whence came the "right which the constitution protects, we find "that when private property is 'affected with a "public interest, it ceases to be *juris privati* only.' "This was said by Chief Justice Hale more than "two hundred years ago, in his treatise "De portibus Maris," 1 Harg. Law Tracts, 78, and has "been accepted without objection as an essential "element in the law of property ever since. Property thus becomes clothed with a public interest "when used in a manner to make it of public consequence, and affects the community at large. "When, however, one devotes his property to a "use in which the public has an interest, he, in "effect, grants to the public an interest in that "use, and must submit to be controlled by the "public for the common good to the extent of

" the interest he has thus created. He may with-
" draw his grant by discontinuing the use; but,
" so long as he maintains the use, he must sub-
" mit to the control."

Munn v. Illinois, 94 U. S. 113, 126.

" The business of manufacturing and distribut-
" ing illuminating gas, by means of pipes laid in
" the streets of a city, is a business of public
" character. It is the exercise of a franchise be-
" longing to the state. The services rendered
" and to be rendered for such grant are of a pub-
" lic nature."

Westfield Gas & Milling Co. v. Mendenhall, 142 Ind. 538.

" It is true, as suggested in argument, that the
" manufacture and distribution of illuminating
" gas by means of pipes or conduits placed, under
" legislative authority, in the streets of a town
" or city, is a business of a public character. Un-
" der proper management, the business contri-
" butes very materially to the public convenience,
" while, in the absence of efficient supervision, it
" may disturb the comfort and endanger the
" health and property of the community."

New Orleans Gas Co. v. Louisiana Lighting Co., 115 U. S. 650, 658.

The business of manufacturing and distributing illuminating gas is not only one of *a quasi*-public character, but, as indicated in the case last cited, is one which may, if not regulated, become injurious to the health, comfort or safety of the community in which it is carried on, and, for that reason, is within the police power of the state.

This is true even though such business is perfectly lawful, and is not a nuisance *per se*.

Mr. Tiedeman in his work on "Police Powers," volume 2, at page 740, says:

"Where, therefore, certain trades and employ-
"ments which serve some useful purpose and add
"something to the world's wealth are harmful to
"the inhabitants of the locality in which they may
"be conducted; and the harm may be avoided al-
"together or considerably reduced by confining
"them to localities in which the population is
"sparse and the residences are few, it is alto-
"gether permissible to prohibit the prosecution
"of these trades in other localities * * * In
"the same way may the manufacure of pressed
"hay, the maintenance of dairies, the cultivation
"of land within the limits of a town, and the
"storage of cotton and other combustible ma-
"terial, such as oil and gun powder, be prohibited
"in densely settled parts of the city, and the
"prosecution of such trades be confined to cer-
"tain less dangerous localities."

In the case of Jamieson v. Indiana Natural Gas & Oil Co., et al., 28 N. W. 76, involving the question of the constitutionality of an act of the legislature of Indiana prohibiting the use of an artificial pressure in pipe lines used for the transportation of natural gas of more than 300 pounds to the square inch, the court said:

"The question, as the record presents it, is one
"of power. With questions of policy or expedi-
"ency the courts have no concern. License tax
"cases, 5 Wal. 462; Herrerich v. State, 101 Ind.
"564. If a subject is within the legislative power,
"the question whether that power is wisely or un-
"wisely exerted is not a judicial one. * * * *

"A distinctive and conspicuous feature of this "case is that the property upon which the statute "operates is dangerous and is of an extraordi- "nary species and nature. That natural gas is "a dangerous agency is a matter of common "knowledge; and hence courts take judicial no- "tice of that fact. We know, as the legislature "knew, and as every one knows, that natural gas "is in a high degree inflammable and explosive. "Surely, no court would require evidence to in- "form it that artificial gas will ignite and ex- "plode, or that gun powder and dynamite are "intrinsically dangerous; * * * * But we "need not at this place discuss this phase of the "subject at length for the adjudged cases very "clearly show that the courts will take judicial "notice of the qualities of such things as arti- "ficial gas, kerosene, gun powder, dynamite or "the like. Lanigan v. Gas Light Co., 71 N. Y. "29; Wood v. Insurance Co., 46 N. Y. 421; Com. "v. Peckham, 2 Gray 514; Schlicht v. State, 56 "Ind. 173; Frese v. State, 2 So. Rep. 1; State v. "Hayes, 78 Missouri 308; Lohman v. State, 81 "Ind. 15. * * * * We hold without hesita- "tion that natural gas is so dangerous that its "use may be made the subject of police regula- "tion. Decision after decision recognizes the "priciple we have stated and upholds laws regu- "lating the use of property." (Citing cases.)

"The properties of the illuminating gas in or- "dinary use, its inflammable and explosive char- "acter, are well understood, and every person of "mature mind and ordinary intelligence cannot "be presumed to be ignorant of it."

Lanigan v. New York Gas and Light Co., 71 N. Y. 29, 33.

That the city of Los Angeles has the power, under the provisions of the state constitution and of its charter, to regulate the location of business enterprises which are not nuisances *per se,* but the conduct of which may injuriously affect the public health, comfort or safety, has been specifically decided by the Supreme Court of California.

In the case of *ex parte* Lacy, 108 Cal. 326, which involved the validity of an ordinance of the city of Los Angeles prohibiting the maintenance of a steam carpet beating machine within 100 feet of any church, school house, residence or dwelling-house, the court, after quoting article XI., section 11, above set forth, stated:

"It will thus be observed that Los Angeles "city is vested with certain powers by direct "grant from the constitution, and that grant of "power is not confined within narrow limits, but "is broad and far reaching in its scope and ef- "fect. Under this grant of power the city had "the right to pass this ordinance, unless it is in "conflict with general laws; and we know of no "general laws which conflict with it, unless it "can be said to be violative of those general "principles of constitutional liberty which form "the very foundation of both state and federal "constitution. We see nothing in the language "of this ordinance contrary to these great prin- "ciples of our government. We see nothing "there depriving petitioner of any fundamental "rights. In the exercise of its police and sani- "tary power the city has attempted to regulate "the business of beating carpets by steam power.

"Under its constitutional grant it had the right "to regulate this business. The use of steam "power of itself, within municipal territory, has "always been recognized as the proper subject "of regulation; and, in addition here, it may well "be assumed that the dust and other disagree- "able and unhealthy matters arising in such "quantities from the beating of the carpets, as "would naturally be indicated by the use of steam "power, are a constant source of danger and "menace to the good health and general welfare "of the neighborhood where located.

"Conceding the business covered by the pro- "visions of this ordinance not to constitute a "nuisance *per se* and to stand upon different "grounds from powder factories, street obstruc- "tions and the like, still the case is made no bet- "ter for the petitioner. This is not a question of "nuisance *per se*, and the power to regulate is "in no way dependent upon such conditions. In- "deed, as to nuisances *per se*, the general laws "of the state are ample to deal with them. But "the business here involved may properly be "classed with livery stables, laundries, soap and "glue factories, etc., the class of business under- "takings in the conduct of which the police and "sanitary regulations are made to a greater or "less degree by every city in the country. And "in this class of cases it is no defense to the valid- "ity of regulation ordinances to say: 'I am com- "mitting no nuisance, and I insist upon being "heard before a court or jury upon that question "of fact.' In this class of cases a defendant has "no such right. To the extent that it was ma- "terial in creating a valid ordinance we must as- "sume that such question was decided by the "municipal authorities and decided against the "petitioner and all others similarly situated."

*Ex parte* Lacy, 108 Cal. 326.

The ordinance in question does nothing more than restrict the erection and maintenance of gas works and gas receptacles to a certain district within the city—presumably the most suitable locality for such business. Such restriction is nothing more than a simple and necessary regulation of the business of manufacturing and storing gas. Considering the well known nature and character of illuminating gas, that it is highly inflammable and explosive, and considering further the equally well known fact that its manufacture is inseparably attended with noxious vapors and offensive odor, we submit that the business is one which may become a menace to the safety, health and comfort of the neighborhood in which it is carried on, and that it is, therefore, subject to police regulation.

"As to the enjoyment of property, the rule is "general that it must be accompanied with such "limitations as will not impair the equal enjoy-"ment by others of their property. *Sic utere tuo* "*ut alienum non laedes* is a maxim of universal "application. For the pursuit of any lawful "trade or business, the law imposes similar con-"ditions. Regulations respecting them are al-"most infinite, varying with the nature of the "business. Some occupations, by the noise made "in their pursuit, some by the odors they en-"gender, and some by the dangers accompanying "them, require regulations as to the locality in "which they shall be conducted. Some by the "dangerous character of the articles used, man-"ufactured or sold, require, also, special quali-

" fications in the parties permitted to use, manu-
" facture or sell them."

Crowley v. Christensen, 137 U. S. 86, 90.

II

**The allegations of the complaint as to the unreasonableness of this ordinance are not sufficient to sustain a decision against its validity.**

The complaint alleges that the ordinance complained of is unreasonable, and sets forth the fact that the district described in the ordinance, from which gas works are excluded, is one devoted almost exclusively to manufacturing and commercial enterprises. This fact is, however, we submit, insufficient to show the unreasonableness of the ordinance. It is well settled that objections made upon this ground are regarded with great circumspection by the courts, and such objections will be sustained only in very clear cases, because the power to select the subjects of legislation, within constitutional limits, is committed to the law-making branch of the government, and the decision of the question of the expediency or reasonableness of a law is necessarily involved in the exercise of the legislative discretion used in enacting the law.

" The expediency or inexpediency of an act is
" a question for the legislature and not for the
" court. Whenever an act of the legislature can

" be so construed and applied as to avoid a con-
" flict with the constitution and give it the force
" of law, such construction will be adopted by the
" courts.

" Courts have no right to set aside, to arrest or
" nullify a law passed in relation to a subject
" within the scope of the legislative authority on
" the ground that it conflicts with their notions
" of natural rights, absolute justice or sound
" morality."

Slack et al. v. Jacob et al., 8 W. Va. 612.

" Under a general grant of power over nui-
" sances, town authorities have no power to adopt
" an ordinance declaring a thing a nuisance which
" in fact is clearly not one, but in doubtful cases
" depending upon a variety of circumstances re-
" quiring judgment and discretion their action is
" conclusive."

Harmon v. City of Lewiston, 46 Am. St. Rep. 893.

" When a town council is authorized by law to
" do a particular act at its discretion, the courts
" will not control this discretion and inquire into
" the propriety, economy and general wisdom
" of the undertaking, or into the details of the
" manner adopted to carry the project into exe-
" cution."

Darnelly v. Cabanns, 52 Ga. 212.

Wells v. Mayor, 43 Ga. 67.

" That the constitutionality of a statute ought
" not to be made to depend on the finding of a jury
" on the facts of a case is manifest. If the plain
" provisions of the constitution have been vio-

" lated, or if the act cannot be said to be a proper " exercise of the police power, in view of the " facts of which judicial notice may be taken, then " the duty of declaring the act invalid is clear. " But in the absence of such finding the act " stands."

State v. Schlenker (Ia.) 51 L. R. R. 351.

" But the defendant takes the broader ground " that the legislature cannot, under the constitu- " tion, prohibit the sale of milk from healthy " cows which in the natural state falls below the " standard fixed by the act unless such milk or " the articles made from it are in fact unwhole- " some or dangerous to public health. How is " that question of fact to be determined? The " court cannot take judicial notice whether the " milk below the standard is or is not unwhole- " some or dangerous to public health. Is that to " be a question for the jury? If so, a court must " charge a jury in each case if they find milk be- " low the standard to be unwholesome, then the " statute is constitutional; if they find it whole- " some, then the statute is unconstitutional. Evi- " dently a constitutional question cannot be set- " tled, or rather unsettled, in that way. The con- " stitutionality would vary with the varying " judgment of juries. Either then the legislature " can, under the constitution, forbid the sale of " milk below a certain standard, whether such " milk be in fact wholesome or not, or else they " cannot do this whether that milk be in fact " wholesome or not. If they may fix a standard, " they must judge whether or not milk below that " standard is wholesome. The courts cannot re- " view that judgment."

People v. Cipperly (N. Y.) 4 N. E. 108.

In the case of *in re* Wilshire, 103 Fed. 620, an

ordinance of the city of Los Angeles prohibiting the erection of advertising signboards of a greater height than six feet, was attacked on the ground that it was unreasonable. The judge in his opinion said:

" I entertain a good deal of doubt in respect to " the reasonableness of the maximum limitation " placed upon the structures in question by the " municipal authorities of the city of Los An- " geles, but the fact that this doubt exists is suffi- " cient reason for the court to decline to adjudge " the ordinance invalid. It is only in clear cases " that such a judgment should be given."

Even if plaintiff's contention as to the unreasonableness of this ordinance, as presented in the state court, had any merit, we submit that, after having been considered by that court, it cannot be urged or considered here. The question of the unreasonableness of an ordinance is one properly left to the decision of the state court. As was said by Mr. Justice Field, in the case of Barbier v. Connolly, 113 U. S. 27:

" Our jurisdiction is confined to a consideration " of the federal question involved, which arises " upon an alleged conflict of the 4th section (of " the ordinance) in question with the 1st section " of the 14th amendment of the Constitution of " the United States. * * The provision is purely " a police regulation within the competency of " any municipality possessed of the ordinary

" powers belonging to such bodies. And it would
" be an extraordinary usurpation of the authority
" of a municipality if a federal tribunal should un-
" dertake to supervise such regulations. It may be
" a necessary measure of precaution in a city
" composed largely of wooden buildings like San
" Francisco, that occupations, in which fires are
" constantly required, should cease after certain
" hours at night until the following morning;
" and of the necessity of such regulations the mu-
" nicipal bodies are the exclusive judges; at least
" any correction of their action in such matters
" can come only from state legislation or state
" tribunals."

Barbier v. Connolly, 113 U. S. 27.

There is nothing on the face of the ordinance showing that it is unreasonable or oppressive, but, on the contrary, it is, by its terms, applicable to all persons alike, and, so far as can be judged from the description of the district set forth therein, outside of which gas works or gas receptacles may not be erected or maintained, the territory contained in such district is an extensive one.

Since then the ordinance is free from patent defects, and its reasonableness has been sustained by the state courts, the highest judicial tribunal will not go behind that decision.

III.

**All rights to contracts and property are held subject to such regulations as may be made from time to time by the state for the protection of public health comfort and safety.**

The contention of plaintiff in error, as evidenced by her complaint, is that the grant of the permit by the board of fire commissioners for the erection of the gas works on her premises gave rise to a contract between the city and herself, and that the adoption subsequently of the ordinance complained of impaired the obligation of such alleged contract; second, that the adoption of this ordinance also impaired the obligations of the contract entered into between plaintiff in error and the contractor for the erection of the gas works; and, third, that the grant of the permit, and the commencement of the erection of the gas works on the premises of plaintiff in error, prior to the adoption of such ordinance vested in her the right to complete said works and to operate the same; and that the adoption of such ordinance violated these rights.

The contract which plaintiff assumes to exist between her and the city is one arising out of the grant by the board of fire commissioners of a permit for the erection of the gas works. The permit in question was granted in the exercise of the police power for the protection of property from fire, under an ordinance requiring every person proposing to establish or conduct a livery stable, blacksmith shop, gas works, or any factory where

power other than animal or water power is used, to first obtain a permit from the fire commissioners therefor. The effect of the permit was simply to remove the restriction upon the use of property imposed by the ordinance, and to give to the owner of the property the privilege of using it just as he might if no such restriction existed. The grant of such a permit can in no sense be deemed to be the grant of a franchise, or of a property right, and therefore no contractual obligations can spring out of it. After receiving such a permit the owner of property is in no better position to claim that the city is estopped to impose regulations prohibiting the use of the property contemplated by the permit, than he would be if the ordinance requiring the procurement of a permit had never existed.

Furthermore, if this ordinance is within the scope of the police power of the city, as we have shown to be the case, whatever contracts or rights are held by plaintiff in error, they must be subject to this power.

Mr. Cooley, in his work on constitutional limitations, in discussing the police power of the states, especially with respect to the impairment of obligations of contracts by the exercise of that power, says:

"All contracts and all rights, it is declared, are "subject to this power; and not only may regula- "tions which affect them be established by the "state, but all such regulations must be subject "to change from time to time, as the general well- "being of the community may require, or as the

" circumstances may change, or as experience
" may demonstrate the necessity.

" Perhaps the most striking illustrations of the
" principle here stated will be found among the
" judicial decisions, which have held that the
" rights insured to private corporations by their
" charters, and the manner of their exercise, are
" subject to such new regulations as from time to
" time may be made by the state with a view to
" the public protection, health and safety, and
" in order to guard properly the rights of other
" individuals and corporations. Although these
" charters are to be regarded as contracts, and
" the rights assured by them are inviolable, it
" does not follow that these rights are at once,
" by force of the charter contract, removed from
" the sphere of state legislation, and that the
" charter implies an undertaking, on the part of
" the state, that in the same way in which their
" exercise is permissible at first, and under the
" regulations then existing and those only, may
" the corporators continue to exercise their
" rights, while the artificial existence continues.

" The obligation of the contract by no means
" extends so far; but, on the contrary, the rights
" and privileges which come into existence under
" it are placed upon the same footing with other
" legal rights and privileges of the citizen, and
" subject in like manner to proper rules for their
" due regulation, protection and enjoyment."

Cooley Cons. Lim., 6th Ed. 707.

" It cannot be supposed that the states intend-
" ed by adopting that amendment (the 14th), to
" impose restraints upon the exercise of their
" powers for the protection of the safety, health
" or morals of the community. * * * The
" principle that no person shall be deprived of life,
" liberty or property without due process of law,
" was embodied, in substance, in the constitutions

" of nearly all, if not all, of the states at the time
" of the adoption of the Fourteenth Amendment;
" and it has never been regarded as incompatible
" with the principle,—equally vital because es-
" sential to the peace and safety of society,—that
" all property in this country is held under the
" implied obligation that the owner's use of it
" shall not be injurious to the community." * *

" A prohibition simply upon the use of prop-
" erty for purposes that are declared by valid
" legislation to be injurious to the health, morals
" and safety of the community, cannot in any just
" sense be deemed a taking or an appropriation of
" property for the public benefit. Such legisla-
" tion does not disturb the owner in the control or
" use of his property for lawful purposes, nor
" restrict his right to dispose of it, but is only a
" declaration by the state that its use by any one
" for certain forbidden purposes is prejudicial to
" the public interests."

Mugler v. Kansas, 123 U. S. 669.

In the case of the Corporation of Knoxville v. Bird, 12 B. J. Lea, 121 (Tenn.), the defendant was arrested and convicted for the violation of an ordinance prohibiting the erection of wooden buildings in a certain district. The defendant contended that the ordinance was unconstitutional, on the ground that it impaired the obligations of his contracts with the lessor of the lot upon which his building was being erected and with the builders who had commenced and were engaged in the erection of the building thereon at the time the ordinance was adopted; and also on the ground that it impaired his vested rights.

The court held that there was no merit in this contention, and in its discussion of the constitutional question thus raised, said:

"It is true the exercise of this power by the "city authorities tends in a considerable degree "to impinge upon and restrain the free use of "the property of parties living within the pre- "scribed limits, the highest idea of property be- "ing that over which man has complete dominion, "with which he may do as he pleases. But it is "an essential element of every organized society "that even this right is to be enjoyed in subordi- "nation to the general public interest of the whole "body. For the benefits conferred by the pro- "tection given by law, and the general advan- "tages received from organized society, this en- "tire freedom is subject to be abridged and reg- "ulated within certain bounds, only limited by "the requirements that private property shall not "be taken or appropriated for public use without "compensation being first made for the property "thus used. The defendant in this case has only "been required to submit his rights to the rule "that a man must enjoy them subject to such "regulation as the interest of the society of "which he is a member may demand."

Corporation of Knoxville v. Bird, 12 B. J. Lea, 121.

And in the case of City of Salem v. Maynes, 123 Mass. 372, it was held that an ordinance providing that a wooden building should not be built within a certain distance of any other wooden building, applied to one for the erection of which a contract had been made and lumber bought and

prepared before the ordinance took effect. In the case of City of New Orleans v. Stafford, 21 Am. Rep. 563, the court held that an act of the legislature providing that no private market should be kept within 12 squares of a public market in the city of New Orleans was not unconstitutional as taking away the property or vested rights of those keeping, and holding licenses to keep, private markets within the prescribed limits at the time of the passage of the act.

"The fourteenth amendment of the United " States constitution is not designed to interfere " with the power of the state sometimes termed " its 'police power' to prescribe regulations to " promote the health, peace, morals, education " and good order of the people."

Barbier v. Connolly, 113 U. S. 27.

"All property and vested rights of individuals " are subject to such regulations of police as the " legislature may establish."

2 Story Con. Sec. 1954.

"It is not too much to say that as against the " police power there is no such thing as a vested " right. * * * No investement, however great, " can so vest a right as to preclude the exercise " of a great governmental power, such as that " under which regulations for the protection of " the health and safety of persons are enacted. " This principle is supported by many decisions. " In Beer Co. v. Mass., 97 U. S. 32, it was said, " 'If the public safety or public morals require " the discontinuance of a manufacture or traffic, " the hands of the legislature cannot be stayed " from providing for its discontinuance by any

"inconvenience which individuals or corpora-
"tions may suffer."

Jamieson v. Ind. Natural Gas & Oil Co., 28 N. E. 76, 79.

Applying the principles laid down in the foregoing decisions to the claim of the plaintiff, as set forth in the complaint, that the ordinance in controversy is unconstitutional and void because it impairs the obligation of a contract between her and the city and the obligation of the contract between her and the builders of the gas works, and also deprives her of vested rights, we submit that there is no merit therein.

IV.

**A municipality cannot in any manner barter away, part with or abridge its right to exercise the police powers delegated to it by the state.**

It has already been shown that the permit granted to plaintiff in error by the board of fire commissioners to erect the gas works did not constitute, or result in, a contract between plaintiff in error and the city and we now submit the proposition that no contract could be made by the city which would have the effect of disabling or abridging its police power.

"It would seem, therefore, to be the prevail-
"ing opinion, and one based upon sound reason,
"that the state cannot barter away, or in any
"manner abridge or weaken, any of those essen-
"tial powers which are inherent in all govern-
"ments, and the existence of which in full vigor
"is important to the well-being of organized so-
"ciety; and that any contracts to that end are
"void, upon general principles, and cannot be
"saved from invalidity by the provision of the
"national Constitution, now under considera-
"tion."

Cooley Cons. Lim., 6th Ed. p. 341.

"The general principle is that it is not within
"the power of a common council to bind its legis-
"lative capacities by any arrangement or stipu-
"lation so as to disable itself from enacting any
"laws that might be deemed essential for public
"good."

Russell on Police Powers, page 88.

In the case of Davenport v. City of Richmond, 81 Va. 636, the city council had conveyed to defendant's grantors certain premises near the outskirts of the city to be used as a powder magazine. A subsequent ordinance declared the said magazine dangerous to life and property and directed it to be removed, at the expense of the owner, to some more remote locality. Davenport claimed that the ordinance was invalid and unconstitutional, because it deprived him of vested rights and impaired the obligation of a contract entered into between the city and his grantors,

and took from him his property without compensation. The court said:

" Upon the principles recognized by this court " in R. F. and R. R. Co. v. City of Richmond, 26 " Gratt., 83, we are of opinion that this position " is not well taken. In other words, that the " withdrawal of the privilege previously granted " to the defendants—to erect and maintain a " powder magazine within the city limits—was " a valid exercise of the police power with which, " to that extent, the city is invested by the legis- " lature, and with reference to which the privilege " was granted and accepted. And hence the in- " conveniece of which the defendants complaint is " *damnum absque injuria.*

" However difficult it may be, if it is possible " at all, to exactly define the limits of that power, " there is no doubt that it extends to the protec- " tion of the lives, health, morals and safety of all " persons in the community, and that it cannot, " by contract or otherwise, be parted with by a " municipal corporation to which it may be dele- " gated. * * * * * * * * * * * * * *

" It is sufficient to say that the storage of gun- " powder in a city or town, being attended with " danger, its regulation is a matter within the " power of corporate authorities, and consequent- " ly the judgment of the city council as expressed " in the ordinance requiring the removal of the " magazines in question, is conclusive upon the " courts.

" The Hastings court, therefore, did not err in " instructing the jury that 'the fact that the city " of Richmond in 1866 sold to the defendants, or " to those under whom they claim title, the site " of the powder magazines, now ordered by the " council to be removed, for the purpose or with " the knowledge that the same was to be used

" for the erection of powder magazines, does not " prevent the city council from passing the ordi- " nance of August 17, 1882, if, in the judgment " of that body, the safety or convenience of the " people demands the removal of said mag- " azines.' "

Davenport v. City of Richmond, 81 Va. 636.

In the case of Newson v. City of Galveston, 13 S. W. 368, the plaintiff was granted a permit under a city ordinance to establish and maintain a meat market at a particular location. Thereafter the city council so amended the ordinance under which plaintiff's permit was granted as to make it unlawful to conduct a meat market in the district in which plaintiff's market was situated. It was contended that the amended ordinance impaired his vested rights and the obligation of his contract with the city. With reference to this contention the court said:

" Police powers possessed by such (municipal) " corporations cannot be fettered by contracts, " but must be left free to be exercised at all times " whether in conferring, or withdrawing priv- " ileges once conferred. If a license tax had been " paid for a year, this would not deprive the city " of the power to withdraw the privilege before " its expiration if the public welfare demanded it. " Much less would the fact that the city for a " time had received the tax and granted the priv- " ilege make it incumbent on it to continue to do " so. If appellant expended money in preparing " his private market place for the conduct of his " business, he did so with the full knowledge that

"the city might at any time forbid the business "(market) to be there conducted."

Newson v. City of Galveston, 13 S. W. 368.

In the case of Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, it was held that a grant by the state to a private corporation of the privilege of manufacturing fertilizer could be abrogated by an ordinance of the village of Hyde Park to which general police power had been subsequently delegated by the state. That the fertilizing company could thus be compelled to abandon the works which it had erected and established at a cost of more than $200,000, and that the village ordinance was not such impairment of the obligation of the charter contract between the company and the state as is forbidden by the constitution of the United States.

Even if it be assumed, therefore, that by the grant of the permit by the board of fire commissioners for the establishment of the gas works by the plaintiff, the city authorities consented and agreed to the erection and maintenance of such works, yet it is clear that the city, by such consent, was not deprived of the right, under its police power, subsequently to prohibit the erection or maintenance of the same.

V.

**The question whether the state court erred in refusing to consider or decide the claim of plaintiff in error that she was entitled to an injunction against the enforcement of the ordinance complained of by criminal prosecution does not arise on this appeal.**

The relief prayed for by plaintiff in error in her complaint was, that the permit granted by the board of fire commissioners be declared to be a valid and existing contract between her and the city; that the ordinance of the city, passed subsequent to the grant of such permit, be declared null and void; that the defendant city be enjoined from attempting to enforce said ordinance by criminal prosecution, and that the defendant be enjoined from, in any manner, obstructing the plaintiff in error from erecting or operating the gas works. The state court decided that the permit granted by the board of fire commissioners was not a contract; that the ordinance complained of did not impair the obligations of contracts, and was not an unwarranted interference with the enjoyment of property; but that it was a valid police regulation, and held that "this view makes it unnecessary to consider the question elaborately discussed by counsel, to-wit, whether or not a court of equity will ever

enjoin a criminal prosecution." One of the errors assigned is, that the state court erred in not determining that the plaintiff in error was entitled to the relief in a court of equity enjoining the city from enforcing, by criminal prosecution, the said ordinance.

But it is submitted that this assignment presents no decision of the state court for re-examination by this court. Furthermore, the question whether the state court, sitting as a court of equity, had power to restrain by injunction the enforcement of a municipal ordinance by criminal prosecution, on the ground that such ordinance is invalid, is not Federal in character, but is one relating solely to the application of local or general law.

If the state court had held that an injunction would not lie under such circumstances, that decision would not have been subject to review by this court, because it would not have involved the determination of a Federal question; much less will an appeal lie to this court from the action of the state court in declining to pass upon the question whether or not a court of equity will ever enjoin a criminal prosecution. However, we anticipate that counsel for plaintiff in error will discuss this question in their argument, and we beg, therefore, to submit the following proposition pertinent thereto:

VI.

**A bill in equity will not lie to restrain the enforcement of a municipal ordinance by criminal prosecution upon the mere ground of its alleged invalidity.**

This rule is explicitly announced in the leading case of *In re* Sawyer:

"From long before the Declaration of Inde-
" pendence it has been settled in England that a
" bill to stay criminal proceedings is not within
" the jurisdiction of the court of chancery,
" whether those proceedings are by indictment or
" by summary process * * * The modern de-
" cisions in England, by eminent equity judges,
" concur in holding that a court of chancery has
" no power to restrain criminal proceedings, un-
" less they are instituted by a party to a suit al-
" ready pending before it, and to try the same
" right that is in issue there. * * * * And
" in the American courts, so far as we are inform-
" ed, it has been strictly and uniformly upheld
"and has been applied alike whether the prose-
" cutions or arrests sought to be restrained arose
" under statutes of the state, or under municipal
" ordinances."

*In re* Sawyer, 124 U. S. 200-225.

" Undoubtedly, the courts of the United States
" have the power, under existing legislation, by
" writ of habeas corpus, to discharge from cus-
" tody any person held by state authorities under
" criminal proceedings instituted under state en-
" actments, if such enactments are void for repug-
" nancy to the Constitution, laws or treaties of the
" United States. * * * But the existence of
" the power in the courts of the United States to

" discharge upon habeas corpus by no means im-
" plies that they may, in the exercise of their
" equity powers, interrupt or enjoin proceedings
" of a criminal character in a state court. The
" plaintiffs state that the toll-gatherers in their
" service had been indicted in a state court for
" violating the provisions of the act of 1895 in
" respect of tolls. Let them appear to the indict-
" ment and defend themselves upon the ground
" that the state statute is repugnant to the Con-
" stitution of the United States. * * * *
" And if the question is determined adversely to
" the defendants in the highest court of the state
" in which the decision could be had, the judg-
" ment may be re-examined by this court upon
" writ of error. That the defendants may be fre-
" quently indicted constitutes no reason why a
" Federal court of equity should assume to inter-
" fere with the ordinary course of criminal pro-
" cedure in a state court."

Fitts v. McGhee, 172 U. S. 528, *et seq.*

We submit that the exception to the general rule, that a court of chancery has no power to restrain criminal prosecutions, is clearly stated in the foregoing quotation from the case of *in re* Sawyer, and that a court of equity has no such power, *"unless they"* (the criminal prosecutions or proceedings) *"are instituted by a party to a suit already pending before it, and to try the same right that is in issue there."* As was stated by the judge of the Circuit Court for the southern district of California, in the case of Davis & Farnum Co. v. City of Los Angeles, 115 Fed. 537, 542, referring to the rule laid down in the Saw-

yer case, "This unambiguous and definite statement of the rule does not admit of any exception, other than the one which it expressly shows." The Davis & Farnum case was a suit brought in the Circuit Court of the United States to enjoin a threatened criminal prosecution under the same ordinance drawn in question in this case, on the ground that the ordinance was invalid, and that the purpose and effect of the threatened prosecution was to compel complainant, who was the subcontractor for the erection of the gas works referred to in the present case, to abandon said work, thereby destroying or impairing complainant's vested property rights. The questions presented in that case related to the equitable jurisdiction of the court and to the validity of said ordinance. The Circuit Court, after a careful examination and analysis of the authorities, held that it had no jurisdiction as a court of equity to restrain, or to enjoin, criminal prosecutions under the ordinance complained of, even though it was alleged to be unconstitutional, and that the purpose and effect of the prosecution was to injure complainant in its property rights, for the reason that complainant was not within the exception to the rule of equity jurisdiction laid down in the Sawyer case. On appeal, this court affirmed the decree of the Circuit Court dismissing the bill, placing its decision on the ground that the appellant had shown no legal interest in

the controversy between Mrs. Dobbins and the city with respect to her right to erect the proposed gas works, and on the further ground that it did not appear that the complainant had no complete and adequate remedy at law against the principal contractor. This disposition of the case made it unnecessary for this court to decide whether or not criminal prosecutions might be enjoined by a court of equity. The court, however, referred to the decision *In re Sawyer*, *supra*, as having "so fully considered and settled" this question, that, in a controversy in which it is presented, "No further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule."

Davis & Farnum M'f'g. Co. v. Los Angeles, 189 U. S. 207, 217.

We, therefore, confidently rely upon the case of *In re Sawyer* as determinative of the proposition that criminal prosecutions under the ordinance complained of in this case could not be enjoined by a court of equity, since such prosecutions are outside of the exception to, and fully within, the general rule enunciated in the Sawyer case. There is a distinction, often lost sight of, but very necessary to be observed, between the power of a court of equity to enjoin the en-

tempted enforcement of invalid laws or ordinances, by the acts of state officers done under color of such laws or ordinances( as, for example by seizure of property), and the jurisdiction of the court to enjoin the commencement of criminal prosecutions under such laws or ordinances. In the case of Minneapolis Brewing Co. v. McGillivray, et al., 104 Fed. 258, the plaintiff brought suit, in the Circuit Court for the district of South Dakota, against the sheriff, the chief of police, the state's attorney and the members of the board of county commissioners, to restrain and enjoin them from attempting to enforce payment from the plaintiff of an alleged unlawful license fee, and from in any wise interfering with plaintiff's warehouse and business. The plaintiff, in its bill, showed that it had its principal place of business in the state of Minnesota, and that it had a warehouse in the city of Madison, South Dakota, at which it had been carrying on the business of receiving and storing, as a wholesaler, malt liquors manufactured by it, and selling and delivering the same in original packages to customers in the state of South Dakota. That, under a statute of the state, alleged by complainant to be unconstitutional, the defendants were demanding of plaintiff the payment of a license fee of $600, and upon the refusal of plaintiff to pay the same were threatening to close said warehouse and prosecute

plaintiff and its local agent for a separate violation of such statute for each day said warehouse was operated. Plaintiff prayed that the statute in question might be adjudged unconstitutional and the defendants be restrained from attempting to enforce payment of said license or in any way interfering with plaintiff's warehouse. The Circuit Court held that the case was one over which equity had jurisdiction, for the reason that the complainant had no plain, speedy and adequate remedy at law for the damages which it would suffer if the defendants were allowed to seize and close its place of business, and for the damages resulting from the destruction thereby of plaintiff's business; and that the law complained of, requiring the payment of a license fee of $600, was unconstitutional and void; and the court said:

"The only question that now presents itself is "as to the relief that this court has the power to "grant the complainant in this action. It is al- "leged in the bill that defendants, claiming to act "in their official capacity, threaten to close said "warehouse so operated and maintained by this "plaintiff at said city of Madison aforesaid, and "wrongfully and unlawfully threaten to prose- "cute criminally this plaintiff and its said local "agent, under section 5 of said act, and to so "prosecute for each violation committed on each "day, if said warehouse was continued to be op- "erated as aforesaid by plaintiff or if plaintiff "continued to transact the business theretofore "transcated by it at said Madison. In so far as

"this bill seeks to enjoin the commencement of "criminal proceedings, it cannot be maintained "A court of equity possesses no such power. This "is settled by a uniform current of authorities in "England for two centuries, and in this country "from the foundation of its jurisprudence. (Cit- "ing and quoting from *in re Sawyer,* 124 U. S. "210.) See also, Hemsley v. Myers (C. C.), "45 Fed. 283; Wagner v. Drake (D. C.), 31 "Fed. 849. "This court in this action has, in my "opinion, the right to restrain the defendants "from closing the complainant's warehouse and "place of business as provided in section 5 of the "act under consideration, for the non-payment "only of the license fee required of a wholesale "dealer in malt liquor; and, within this limita- "tion, the order will be that the demurrer be "overruled."

Minneapolis Brewing Co. v. McGillivray, 104 Fed. 272.

Another important distinction to be observed in the cases dealing with the power of a court of equity to enjoin criminal prosecutions, is that adverted to in the opinion of the court in the case of Southern Exp. Co. v. Mayor, etc., of Ensley, et al. In this case the plaintiff prayed for an injunction to enjoin the defendants from enforcing, as against complainant, a license ordinance which attempted to impose upon complainant—a common carrier engaged in interstate commerce—a license for the privilege of doing business in the city of Ensley. The court said:

"The necessities of this case do not require
"much discussion of the power of a court of equi
"much discussion of the power of a court of
"equity to stay or enjoin criminal prosecutions.
"* * * A license imposed for revenue is the ex-
"ercise of the taxing, not of the police, power,
"and prosecutions before the corporate tribunal
"for doing the business without a license are
"*quasi*-penal only, at most. In substance and le-
"gal effect, they are civil proceedings. Royall v.
"Virgina, 116 U. S. 583. The 'offense' does not
"violate any law for the preservation of the
"health, morals, liberty, or peace of the citizens
"of Ensley. Enjoining prosecutions of the 'of-
"fense' here, if there is any law to support it, does
"not in any wise interfere with the control of the
"local tribunals over the mass of governmental
"powers committed to them for the welfare of
"the people of Ensley under what, for want of a
"better name, we denominate the police power.
"It is about prosecutions for offenses under or-
"dinances directed solely to that end that many
"of the authorities are strict in holding that
"courts of equity must not interfere."

The distinction above referred to also applies to the cases like that of Central Trust Co. v. Citizens' St. R. Co., 80 Fed. Rep. 225, and Reagan v. Farmers Loan and Trust Co., 154 U. S. 362, in which courts have assumed jurisdiction to enjoin the enforcement of invalid statutes, criminal in form, but which were in legal effect civil or *quasi*-penal only, and under color of which the defendants, claiming to act as officers of the state, commit acts of wrong and injury to the rights

and property of the plaintiff, acquired under a contract with the state.

In conclusion upon this branch of the argument, we submit the following quotation from the opinion of Hon. Judge Wellborn, in the case of Davis & Farnum Mfg. Co. v. City of Los Angeles, 115 Fed. 537, 543:

"In addition to what has already been said, it "may be appropriately observed that municipal "and state regulations of saloons, beer halls, "theaters and places of amusement generally, "market places, slaughter houses, gas works, "powder magazines, laundries, cemeteries, fire "limits, streets (particularly obstructions, rail- "way tracks, telegraph poles, pipe lines, etc., "therein), indeed of all establishments, trades, "and occupations subject to the police power of "the state,—unavoidably affect property rights, "and are usually rendered effective by making "their violations punishable offenses. Now, if "there were such jurisdiction as that for which "complainant contends, every controversy over "the validity of an ordinance or statute relating "to any of the matters enumerated would furnish "an occasion for interference by injunction; and "thus would be presented the remarkable situ- "ation of courts of equity, state and federal, ex- "ercising supervisory power over the adminis- "tration of a part, not inconsiderable, of the "criminal laws of the country."

**The motives of a legislative body in enacting a law cannot be inquired into by the courts.**

It is suggested in the complaint that the ordinances referred to were adopted, not for the purpose of protecting any public interest or preserving any public right, but that they were suggested and formulated by the Los Angeles Lighting Company, and were adopted by the city council solely for the purpose of protecting that company in the enjoyment of a monopoly in manufacturing and distributing gas in the city of Los Angeles, and for the purpose of hindering and frustrating the efforts of the plaintiff to carry on her lawful business. That courts cannot inquire into the motives which influenced members of the legislature in passing a law has been the settled rule of this court since the decision of the case of Fletcher v. Peck, 6 Cranch 87. In the case of Dodge v. Wolsey, 18 Howard 371, Mr. Justice Campbell said: "The courts cannot look to the corruption, the blindness, nor the mischievious effects of state legislation to determine its binding operation." And in the case of United States v. Des Moines R. R. Co., 142 U. S. 545, this court said: "Although it has sometimes been argued at the bar that the courts ought to inquire into the motives of the legislature when fraud and corruption are alleged, and annul their actions if

the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered into."

"The rule is general with reference to the "enactments of all legislative bodies, that the "court cannot inquire into the motives of the "legislators in passing them, except as they may "be disclosed on the face of the acts or inferable "from their operation considered with reference "to the condition of the country and existing "legislation."

Hing v. Crowley, 113 U. S. 703.

For the reasons given and upon the authorities cited, we submit that the decision of the state court under review in this case contains no error justifying a reversal, and should be affirmed.

Respectfully submitted,

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